In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-61

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS (LBME); HARRY CONNICK, DISTRICT ATTORNEY ORLEANS PARISH; WILLIAM H. STEWART, M.D.; HEALTH AND HUMAN RESOURCES ADMINISTRATION; individually and in their official capacities, their agents, assigns, successors, those acting in concert with them, and all others similarly situated,
Appellants

versus

CALVIN JACKSON, M.D., and DELTA WOMEN'S CLINIC, INC.,
Appellees

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS (LBME); HARRY CONNICK, DISTRICT ATTORNEY ORLEANS PARISH; WILLIAM H. STEWART, M.D.; HEALTH AND HUMAND RESOURCES ADMINISTRATION; individually and in their official capacities, their agents, assigns, successors, those acting in concert with them, and all others similarly situated.

Appellants

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JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

OPINION BELOW

The opinion of the three judge District Court is unreported and is set out in Appendix I as one of four cases consolidated for trial. It is entitled *Calvin Jackson, M.D., and Delta Women's Clinic, Inc. v. William J. Guste, Jr., Attorney General*

of Louisiana, et al., No. 74-2425, and is dated January 26, 1976. The judgment of the District Court is set out under the same caption in Appendix II and was dated and entered on February 20, 1976.

JURISDICTION

This Court has jurisdiction on this appeal of this case under the authority of Title 28, U.S. Code, Section 1253, providing for direct appeal to the U.S. Supreme Court of final injunction decisions issued by three-judge district courts. *See Perez v. Ledesma,* 401 U.S. 82 (1971).

JURISDICTIONAL STATEMENT

The plaintiffs-appellees, Dr. Jackson and the Delta Women's Clinic, Inc., who provide abortion services in the New Orleans area, seek declaratory and injunctive relief against certain laws of the State of Louisiana that they allege to be unconstitutional under the decisions of this Court in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705 (1973) *and Doe v. Bolton* 410 U.S. 179, 93 S.Ct. 739 (1973).

The judgment of the three judge District Court holds four statutes of the State of Louisiana unconstitutional. No rehearing was requested, but defendants-appellants were granted a joint motion to stay on March 4, 1976, Appendix III. A joint motion of appeal to the U. S. Supreme Court was dated and entered on March 9, 1976, Appendix IV.

An extension of 60 days, until July 17, 1976, to docket all four cases was granted on May 4, 1976, Appendix V. The judgment of the three judge District Court was amended on June 12, 1976 in view of *Connecticut v. Menillo,* U.S. , 96 S.Ct. 170 (1975), Appendix VI.

Three of the four same statutes were declared unconstitutional by the District Court in three of the four cases that were consolidated for trial. In order to eliminate repetition, the appeal in this case is limited to La. R.S. 40:1299:33(D).

STATUTE INVOLVED

La. R.S. 40:1299:33(D), West's LSA Revised Statutes, vol. 23 (1976 Pocket Part) at page 149, reads as follows:

> D. No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance or any other kind of benefits for refusing to submit to an abortion. *This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents, or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised.* Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and *by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage* such

written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood. (Emphasis Added).

QUESTION PRESENTED

I Is A Statute Requiring A Woman's Informed Consent To An Abortion Constitutional?

STATEMENT OF REASONS

For the following reasons, the question presented in this cause is substantial, and requires reversal of the District Court.

I

The Requirement Of A Woman's Informed Consent To An Abortion is Constitutional

The requirement of informed consent to any operative procedure is a practice long observed by physicians. This statute merely insures the woman's right to know and understand the nature of the decision she is making.

The three judge District Court held La. R.S. 40:1299:33 (D) unconstitutional because one provision of the law required parental and/or spousal consent in the case of a minor. See emphasized wording in statute at page 3 of this Jurisdictional Statement.

> The Fifth Circuit has foreclosed this subject by its recent decision in Poe v. Gerstein,517 F. 2d. 787 (C.A. 5, 1975), in which it held that

> the fundamental right to an abortion applies to minors as well as to adults and that both the parental and spousal consent requirements of a Florida statute, similar to the Louisiana statute involved here, were unconstitutional.
>
> We are bound by that decision as a controll-precedent and for the reasons expressed by the Fifth Circuit in that case. Thus, we hold La. R.S. 40:1299:33(D) unconstitutional. (Appendix, p. 18a)

The statute is constitutional except for its restricted application to minors. In *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, 44 LW 5197 (July 1, 1976) this Court held the section of a Missouri statute requiring informed consent constitutional and at the same time striking down another section of the same statute that mandated parental and/or spousal consent. Also see, *Bellotti, et al. v. Baird, et al.*, 44 LW 5221 (July 1, 1976). The Court, in taking such action, was relying on the severability provision of the Missouri statute.

La. R.S. 40:1299:33(D) is part of Louisiana Act 72 of 1973. See Appendix VII. Like the Missouri statute the Louisiana law has a severability clause.

> Section 2. If any provisions or items of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

The statute can readily stand and serve an essential constitutional function without reference to the parental and/or spousal consent provisions in the case of a minor, which have now been declared unconstitutional. It should not fall as a unit.

In *Connecticut v. Menillo*, U.S. , 96 S.Ct. 170 (1975) this Court found it necessary to elaborate on its opinions in *Roe v. Wade*, 410 U.S. 112, 93 S.Ct. 705 (1973); *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (1973) when it referred to the Texas abortion statute having to *fall as a unit*. There the Court corrected the misinterpretation of the Connecticut Supreme Court and held that the Texas criminal abortion statute was only unconstitutional when applicable to prosecutions for abortions performed by licensed physicians and was constitutional when applied in the prosecutions of abortions performed by unqualified personnel.

In *Roy v. Edwards*, 294 So. 2d. 507, 511 (La. 1974) the Louisiana Supreme Court set forth the ultimate test of severability.

> ***it is well established that the unconstitutionality of a portion of a statute (or ordinance) does not necessarily invalidate the whole, particularly where there is a severability clause as here. But it is equally well settled that such rule applies only when the unconstitutionality part is independent of and separable from the rest. If it is so interrelated and connected with the other portions as to raise the presumption that the legislative body would not have enacted one part without the remainder, then the entire enactment is null.

The Louisiana Legislature would certainly re-enact La. R.S. 40:1299:33(D) and eliminate the reference to the requirement of parental and spousal consent in the case of a minor which has now been declared unconstitutional. The provision of minority consent is clearly a separate issue that can readily be read out of the statute and is independent and separable from the rest.

The practical problem is that Louisiana has a part time Legislature and this annual session is almost over. It is too late to introduce corrective legislation and we would be obliged to wait another year for proper action which really is unnecessary since this statute's broad severability clause readily protects the constitutional provisions of the statute.

CONCLUSION

FOR REASONS SET FORTH IN THIS STATEMENT THE COURT SHOULD REVERSE THE DISTRICT COURT'S JUDGMENT IN HOLDING LA. R.S. 40:1299:33(D) UNCONSTITUTIONAL

Respectfully submitted,

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CERTIFICATE

We hereby certify that a copy of the foregoing Jurisdictional Statement has been sent via U. S. Mail to opposing counsel properly addressed and postage prepaid this 15th day of July, 1976.

LOUIS M. JONES

APPENDIX

APPENDIX I

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Jan 26, 1976

LINDA FAY WEEKS, WIFE OF GARY ALBERT RAIMER AND GARY ALBERT RAIMER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED — CIVIL ACTION

versus

HON. HARRY CONNICK, DISTRICT ATTORNEY OF THE PARISH OF ORLEANS; HON. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA AND DR. WILLIAM H. STEWART, DIRECTOR HEALTH AND HUMAN RESOURCES ADMINISTRATION — NO. 73-469 — SECTION "F"

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC. — CIVIL ACTION

versus

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, DISTRICT ATTORNEY; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES — NO. 74-2425 — SECTION "F"

MOTHER DOE, INDIVIDUALLY AND
ON BEHALF OF HER MINOR DAUGHTER,
JANE DOE, AND ON BEHALF OF CIVIL ACTION
ALL OTHERS SIMILARLY SITUATED

versus

WILLIAM H. STEWART, M.D., NO. 74-3197
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF THE
STATE OF LOUISIANA HEALTH AND HUMAN
RESOURCES ADMINISTRATION; AND SECTION "F"
GARLAND L. BONIN, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF FAMILY SERVICES OF THE STATE OF
LOUISIANA HEALTH AND HUMAN
RESOURCES ADMINISTRATION

LADY JANE, ON BEHALF OF MARY
JANE, ON BEHALF OF THEMSELVES CIVIL ACTION
AND ALL OTHERS SIMILARLY
SITUATED

versus

HON. HARRY CONNICK, DISTRICT NO. 75-474
ATTORNEY OF THE PARISH OF
ORLEANS; HON. WILLIAM J. SECTION "F"
GUSTE, ATTORNEY GENERAL OF
THE STATE OF LOUISIANA; WILLIAM
H. STEWART, M.D., COMMISSIONER
OF THE LOUISIANA HEALTH
AND HUMAN RESOURCES (CONSOLIDATED CASES)
ADMINISTRATION; AND LEE FRAZIER,
ADMINISTRATOR, CHARITY HOSPITAL
OF LOUISIANA

These consolidated cases, all brought under 42 U.S.C. § 1983, challenge the constitutionality of certain Louisiana Abortion Statutes and state regulations and policies pertaining to Medicaid payments and public hospital facilities for abortions. This three-judge district court was convened to consider the issues raised by these complaints and a hearing was held on the merits.

RAIMER V. CONNICK - No. 73-469

This suit was instituted by plaintiff, Linda Weeks Raimer, who, at the time of suit was approximately 8 to 10 weeks pregnant, indigent, married and living with her husband, Gary Raimer. While an emergency in-patient at Charity Hospital of Louisiana at New Orleans, she was advised by two physicians at the hospital that to carry her pregnancy to term posed a serious threat to her mental and physical health. When her request for an abortion was denied by the OB/GYN Department of Charity Hospital, Mr. and Mrs. Raimer brought this class action for declaratory and injunctive relief challenging the constitutionality of certain criminal statutes of Louisiana, namely La. R.S. 14:87, pertaining to the crime of abortion, and La. R.S. 14:88, pertaining to the distribution of abortifacients, as violative of their rights under the First, Fourth, Ninth and Fourteenth Amendments of the U. S. Constitution.

Plaintiffs also seek injunctive relief, requiring that state hospital facilities be made available for abortion services.

The Federation of Registered Professional and Licensed Practical Nurses of Charity Hospital at New Orleans, the Louisiana State Board of Medical Examiners and the Louisiana State Medical Society were permitted to intervene as amicus curiae.

Under the discretionary powers granted under Rule 42 of the Federal Rules of Civil Procedure, we denied the motion of defendant, Harry Connick, District Attorney for the Parish of Orleans, for a separate trial as to the issues of the constitutionality of La. R.S. 14:87 and 14:88 from the other issues presented. We also took under consideration the motion of defendants to dismiss plaintiffs' complaint for lack of standing. The evidence shows that plaintiff, Mrs. Linda Weeks Raimer, entered Charity Hospital as an emergency patient suffering from a self-inflicted overdose of drugs allegedly to bring about an abortion. At that time, she was in the first trimester of pregnancy. Dr. Keyes of the Psychiatric Department and Dr. Butler of the Department of Medicine recommended an abortion. Although Mrs. Raimer requested an abortion, the OB-GYN Department denied her request on the ground that there was no medical reason therefor . Mrs. Raimer was discharged from Charity on February 15, 1973. Shortly thereafter she obtained an abortion in Washington, D.C.

Defendants contend that since Mrs. Raimer had an abortion prior to institution of suit, she was a non-pregnant female who has no standing to challenge the abortion statutes and policies of Louisiana.

This suit was filed before Mrs. Raimer obtained an abortion.[1] At the time plaintiff requested an abortion, she was pregnant; after her request was denied by Charity, she obtained one out of state.

Defendants next contend that plaintiffs have no standing because Mrs. Raimer had no attending physician requesting the use of Charity Hospital facilities to perform the abortion.

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1. Deposition of Gary Raimer, P. 22.

However, the evidence shows that a psychiatrist and intern at Charity recommended that Mrs. Raimer have an abortion but that she was refused by the OB/GYN Department. At the time Mrs. Raimer requested an abortion, it was a criminal offense in Louisiana for anyone to perform this procedure.

Defendants also contend that plaintiffs have no standing to challenge the policies at Charity Hospital because they are not indigent, destitute or poor.

Under La. R.S. 46:6, although the Board of Administrators of state-supported hospitals must accept emergency patients whatever their financial status, they have a duty to refuse admission to any person not poor and destitute.

At the time Mrs. Raimer requested an abortion, she was not working, her husband had not worked for over a year and was on public welfare.

Under the above circumstances we find that Mrs. Raimer, a pregnant woman who sought an abortion, has standing to challenge these statutes and policies. Her right to obtain an abortion or to receive and use abortifacients is adversely affected by the statutes and policies in question, thus there is a nexus between the statutes asserted by Mrs. Raimer and the claims she presents. Plaintiff has a personal stake in the outcome sufficient to insure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[2]

Defendants' motion to dismiss is therefore denied.

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2. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739 (1973); Doe v. Poelker, 497 F.2d 1063 (C.A. 8-1975) app. after rem. 515 F.2d 541; Doe v. Scott, 321 F.S. 1385 (N.D. Ill. 1971) vac. Hanrahan v. Doe, 410 U.S. 950, 93 S.Ct. 1410 (1973).

La. R.S. 14:87 and 14:88 are challenged by plaintiffs as an unconstitutionally overbroad state interference in women's right of privacy in the abortion decision.

The wording of these Louisiana statutes encompasses abortions performed by licensed physicians or the distribution or sale of abortifacients by licensed physicians and druggists of any medication or device for the purpose of procuring an abortion. Enforcement of these criminal statutes would make it impossible for any physician to perform or any woman to obtain an abortion for any reason at any time during her pregnancy regardless of the trimester.

La. R.S. 14:87 is a blanket criminal prohibition of the performance of all abortions, even those performed to preserve the life or health of the mother. It reads in pertinent part as follows:

> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> . . . .

The right of a pregnant woman to choose, in consultation with her physician, to terminate her pregnancy and the attendant right of the physician to perform abortions has been thoroughly discussed by the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739 (1974), where state criminal statutes interfering with these rights were held unconstitutional.

Although the language in the Louisiana statutes differs somewhat and is more restrictive than the Texas and Georgia

statutes, the substance is essentially identical.

On the basis of the Supreme Court's decisions in *Roe* and *Doe*, La. R.S. 14:87 is therefore unconstitutional.

La. R.S. 14:88, also a criminal statute, reads in pertinent part as follows:

> Distribution of abortifacients is the intentional:
>
> (1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or
>
> (2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage.
>
> . . . .

La. R.S. 14:88 (1) thus would prohibit such acts as the original sale of medical instruments or other articles to doctors who wish to perform abortions, and their distribution by a doctor or druggist to his patient or customer. The statute contains no exceptions for abortions necessary to save the mother's life nor does it differentiate between the stages of pregnancy as does the Supreme Court's decisions in *Roe* and *Doe*.

Thus on the authority of the Supreme Court decisions in *Roe* and *Doe*, La. R.S. 14:88(1) is unconstitutionally overly broad.

La. R.S. 14:88(1) also prohibits the advertisement for distribution of any drug, portion, instrument, etc.,and section (2) prohibits the publication of any advertisement or account of any secret drug or nostrum to be used for

producing abortion. These provisions relating to advertisement are likewise overly broad and unconstitutional under the authority of the recent Supreme Court decision in Bigelow v. Virginia, U.S. , 95 S.Ct. 2222 (1975), in which the Court annulled the misdemeanor conviction of a Virginia newspaper editor who had violated a Virginia statute prohibiting the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The newspaper had published an advertisement relative to the availability of abortions in the State of New York. The Supreme Court held that the Virginia statute prohibiting publication of the advertisement in question unconstitutionally infringed upon the newspaper editor's First Amendment rights. For the reasons expressed by the Supreme Court in *Bigelow*, the advertisement prohibited in the Louisiana statutes likewise infringes upon First Amendment rights and is unconstitutional.

Plaintiffs attack the constitutionality of the abortion policy at Charity Hospital of Louisiana in New Orleans under the 14th Amendment to the U.S. Constitution.

Charity Hospitals of Louisiana are public hospitals created by the State Legislature, primarily founded to treat the medical ills of the poor, destitute or emergency patients.[3] They are supported by state funds, under the administrative and regulatory authority of the Louisiana Health and Human Resources Administration (HHRA).[4]

The OB/GYN department at Charity Hospital in New Orleans is divided between the Tulane and LSU Medical Schools. Physicians are employed by the respective medical schools, some of whom give their services free to the hospital.

On March 16, 1973, Dr. Charles C. Mary, Jr., then Com-

3. La. R.S. 46:5.

4. La. R.S. 46:1751 *et. seq.*

missioner of the Louisiana Health & Social Rehabilitation Services Administration, issued a statement on the *Roe* and *Doe* decisions of the Supreme Court. Speaking in his official capacity, Dr. Mary stated that the Administration would not allow any actions that destroy human life. Sometime thereafter Dr. Mary resigned his position and the Louisiana Health & Social Rehabilitation Services Administration was incorporated into the Louisiana Health and Human Resources Administration.

Since July 14, 1974, however, the Statement of Admission Policy for Charity Hospital of Louisiana at New Orleans reads as follows:

> That since the final judgment in Louisiana State Board of Medical Examiners vs. Guste (Rosen) No. 74-380, July 14, 1974, Charity Hospital of Louisiana at New Orleans has had no affirmative policy pro or con with respect to abortions but has operated all its services as follows:
>
> All patients with medical and surgical problems are evaluated by a house officer and/or a staff physician. All medical services are provided through the faculty, staff and students of the Louisiana State University Medical School or the Tulane University Medical School.
>
> The appropriate therapy for any patient presenting himself or herself at Charity Hospital of Louisiana in New Orleans is designed by the house officer and staff physician for what, in the individual physician's judgment, is in the best medical interest of the patient. In case of pregnancy, if a patient appears at the emergency room with complaint of pregnancy, she is seen by a physician. If pregnancy is confirmed by

> appropriate tests, she is referred to the Tulane or LSU OB Clinic, depending upon which school is rendering the service at the time she may present herself. If abortion is requested, she is evaluated as any other pregnant patient and appropriate therapy is recommended following staff physician evaluation. No house officer or staff physician is prohibited or compelled to perform an abortion and the same policy is applied to supportive staff.

Therapeutic abortions, hystorectomies, and sterilizations are performed at Charity. Although pregnant women have sought elective abortions, none has been performed.

Plaintiffs' contention that Charity Hospital of New Orleans has a silent policy among those in authority that elective abortions are prohibited is not borne by the evidence.

What the evidence did show was that the July 14, 1974, policy statement was never disseminated to the Directors, staff, or other personnel employed by or at or in training at Charity Hospital of New Orleans and although most employees knew of Dr. Mary's statement, the majority of persons employed at the OB/GYN Clinic were unaware of the state's current written policy.[5]

Although there was some testimony adduced at the hearing that particular doctors told their patients they did not perform abortions, no evidence was introduced to show that under current hospital policy all physicians employed at Charity would refuse to perform abortions.

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5. Testimony of Dr. Lee Frazier, Director of Charity Hospital; Dr. Harry Dascom, Medical Director of Charity Hospital; Dr. Abe Mikal, Chairman, OB-GYN Dept. LSU Medical School; Dr. Jason Collins, Chairman, OB-GYN Dept., Tulane University Medical School, Dr. Rudolph Jacobs, Resident, OB-GYN Dept., Charity Hospital.

Therefore, we hold that the written policy of Charity Hospital of New Orleans is constitutionally adequate to fit the medical needs and necessities of the mental and physical health of the patient. Defendants are to take positive steps to disseminate the written policy of July 14, 1974,to all physicians, house officers, and other personnel employed at Charity Hospital of Louisiana in New Orleans. However, those doctors, nurses and other personnel who work at Charity and who have moral and religious convictions against the performance of abortions are not required to participate in their performance.

JACKSON, ET. AL. VS. GUSTE, ET. AL. - No. 74-2425

Plaintiff, Dr. Calvin Jackson, is a physician, licensed to practice medicine in the State of Louisiana. On August 31, 1974, Dr. Jackson contracted to use the facilities, equipment, supplies and administrative personnel and services of plaintiff, Delta Women's Clinic, Inc., to perform first trimester abortions.

Plaintiffs, contending they have in the past and expect in the future to be harassed by state court prosecutions, instituted this action for monetary damages, declaratory and injunctive relief challenging the constitutionality of La. R.S. 14:87, pertaining to the crime of abortion; La. R.S. 14:87.4, pertaining to the crime of abortion advertising; La. R.S. 40:1299.33(D), the abortion consent statute; and La. R.S. 40:1299.34 the abortion counseling statute. Additionally, plaintffs attack Louisiana's abortion policies in connection with its Medicaid program and Charity Hospital of Louisiana in New Orleans as violative of their rights under the First and Fourteenth Amendments to the U.S. Constitution and the Social Security Act, 12 USC 1396 *et seq.*

Under Rule 42 of the Federal Rules of Civil Procedure, we granted plaintiffs' motion to sever the damage portion of this action from the constitutional issues, to be heard by a single

judge at a later date. We also took under consideration motion of defendants to dismiss plaintiffs' complaint.

The original ground for dismissal advanced by the State of Louisiana is the abstention doctrine because of a pending Louisiana state court proceeding against plaintiffs. The state suit, Civil Action No. 575-902, of the Civil District Court for the Parish of Orleans, Louisiana, was filed in July 1974 by Attorney General Guste against Delta Women's Clinic, Inc. to enjoin the corporation from performing abortions without a medical license in violation of the Louisiana Medical Practices Act, La. R.S. 12:901 *et seq*. On August 21, 1974, after three days of trial, the State Court issued a permanent injunction against the corporation prohibiting it from practicing medicine without a license. Delta Women's Clinic, Inc. was the sole defendant in this State action, and did not appeal the judgment or go forward with its reconventional demand. The corporation was dissolved shortly thereafter and Dr. Calvin Jackson, a former employee of the corporation, continued to perform abortions in the facilities formerly used by Delta. Dr. Jackson was not a party in the State Court litigation and thus the abstention doctrine of Younger v. Harris [6] is not applicable under the circumstances of this case. Furthermore, the dissolution of Delta Women's Clinic, Inc. abates any legal action initiated by and against it.[7] Therefore, the motion to dismiss this action based on abstention is denied.

The second ground urged by defendants is the absence of a case or controversy necessary for federal jurisdiction under Article III of the Constitution. Defendants contend that since there is no genuine threat of enforcement of prosecution of Dr. Jackson by state officials there exists no actual justiciable controversy. Since the Supreme Court in *Doe v.*

6. 401 U.S. 37, 91 S.Ct. 746 (1971).

7. Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U.S. 257, 47 S.Ct. 391 (1927) and authorities cited therein.

Bolton[8] has decided this identical question, i.e. that a physician should not be required to await and undergo a criminal prosecution before he can seek relief, we find that Dr. Jackson's suit presents a justiciable controversy and that he has standing to bring it. Defendants' motion to dismiss Dr. Jackson's suit is denied.

However, defendants' motion to dismiss Delta Women's Clinic, Inc. is based on the grounds that there is no case or controversy existing between it and defendants. It is elemental that there must be parties before there is a case or controversy[9] and since Delta has been dissolved, the motion to dismiss must be granted.

Additionally we find that Dr. Jackson has standing to challenge La. R.S. 14:87, and the Charity Hospital abortion policies, heretofore disposed of in Raimer v. Connick, and Louisiana's Medicaid Program [10] hereinafter discussed.

Dr. Jackson attacks Louisiana's anti-abortion advertising and counseling statutes (La. R.S. 14:87.4 and La. R.S. 40: 1299.34) as an overly broad patent infringement of his and his patients' constitutional guarantees of free speech and their rights of privacy under the First, Fourth, Ninth and Fourteenth Amendments to the U.S. Constitution.

The statutes in question prohibit Dr. Jackson from advertising or publicizing his services and others are prohibited

8. 410 U.S. 179 at 188, 93 S.Ct. 739 at 745 (1974).

9. Ellis v. Dyson, U.S. , 95 S. Ct. 1691 (1975).

10. Doe v. Bolton, *supra;* Griswold v. Conn., 381 U.S. 479, 85 S.Ct. 1678 (1965); Nyberg v. City of Virginia, 361 F.S. 932 (D.C. Minn. 1973) aff'd. 495 F.2d 1342 (CA 8-1973) app. dis. 419 U.S. 891, 95 S.Ct. 169 (1974); Wulff v. Singleton, 508 F.2d 1211 (C.A. 8-1974), writs granted, U.S. , S.Ct. (May 23, 1975); Doe v. Scott, *supra.*

from recommending his services, thus affecting his medical practice and the rights of his patients by restricting information concerning the availability of abortion services.

The Supreme Court consistently has permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Thus, plaintiff has standing to test the constitutionality of the statutes in question.[11]

La. R.S. 14:87.4, a criminal statute, reads in pertinent part as follows:

> Abortion advertising is the placing or carrying of any advertisement of abortion services by the publicizing of the availability of abortion services.
>
> . . . .

This statute which prohibits any person from publicizing the availability of abortion services is broad enough to encompass virtually any mention to any person that abortion services are legal and available.

Therefore, under the recent Supreme Court decision of Bigelow v. Va., supra, we declare La. R.S. 14:87.4 unconstitutional for the same reasons expressed heretofore in the case of Raimer v. Connick, supra, wherein we declared unconstitutional the advertising provisions of La. R.S. 14:88(1).

La. R.S. 40:1299.34 reads as follows:

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11. Bigelow v. Commonwealth of Va., U.S. 95 S.Ct. 222 (1975); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1964); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965); Griswold v. Conn., *supra;* Abele v. Markle, 452 F.2d 1121 (CA 2-1971) on rem. 342 F.S. 800 (D. Conn. 1972); Planned Parenthood Assn. v. Fitzpatrick, 401 F.S. 554 (E.D. Pa. 1975).

> No person employed by the State of Louisiana, by contract or otherwise, or of any subdivision or agency thereof, and no person employed in any public or private social service agency, by contract or otherwise, including workers therein, which is a recipient of any form of governmental assistance, shall (require) or recommend that any woman have an abortion. Notwithstanding anything contained herein to the contrary, this section shall not apply to a doctor of medicine, currently licensed under the provisions of the Louisiana Medical Practices Act (R.S. 37:1261. et seq.) who is acting to save or preserve the life of a pregnant woman.

The anti-abortion counseling statute prohibits state employees or employees of any agency receiving governmental assistance from recommending an abortion regardless of the circumstances. Included in the definition of "governmental assistance" are federal, state and local grants, loans or other financial aid. (La. R.S. 40:1299.33). Licensed physicians are exempt from the prohibition only if they are acting to save or preserve the life of the mother.

The fundamental right of freedom of speech includes not only the right to utter but the right to receive and distribute information and ideas, the right of freedom of inquiry and thought, and the liberty to discuss openly all matters of public concern without previous restraint or fear of punishment.[12]

> "The constitutional guarantee of free speech extends to more than abstract discussion unrelated to action, but free trade in ideas also means free

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12. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969); Griswold v. Conn., *supra;* Ginzburg v. U.S., 383 U.S. 463, 86 S.Ct. 942 (1966); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972).

> trade and the opportunity to persuade to action not merely to describe facts." Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315 (1945).

Not all forms of speech are granted First Amendment protection;[13] persons employed by the government have the right to speak as they will, however, the State may limit their right of free speech if it is essential to the integrity of the public service and if the infringement is limited to the necessities of the situation.[14]

State statutes affecting free expression protected by the First Amendment must meet the requirements of specificity and overbreadth.

Plaintiffs contend the word "recommend," as used in the statute, is unconstitutionally vague. To "recommend" is to present as one's choice for something or to mention as being worthy of acceptance or having one's approval.[15] We find that "recommend" given its normal meaning and common understanding is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[16]

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13. Chaplinsky v. N.H., 315 U.S. 568, 62 S.Ct. 766 (1942) (fighting words); Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304 (1957) (obscenity); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) (libel); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969) (incitement).

14. Pickering v. Bd. of Ed., 391 U.S. 563, 88 S.Ct. 1731 (1968); United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947); U.S. v. Marchette, 466 F.2d 1309 (CA 4-1972) cert. den. 409 U.S. 1063, 93 S.Ct. 553 (1972).

15. Webster's New International Dictionary, 3d Ed. Unabridged, p. 1897.

16. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1241 (1974); U.S. v. Vutich, 402 U.S. 62, 91 S.Ct. 1294 (1974); Abele v. Markle, *supra.*

The constitutional guarantee of privacy in the abortion decision includes the doctor's right to discuss the advantages and disadvantages of abortion and to advise his patient concerning this choice. Speech is therefore an essential ingredient to the effective and intelligent decision of pregnant women involving the right of a doctor and his patent to talk together freely.

The deterrent effects of this statute are real and substantial It prohibits all state employed physicians from recommending an abortion regardless of the stage of pregnancy and regardless of the health of the mother. It prevents at all stages of pregnancy, women from seeking and doctors from offering to perform abortions. It not only limits the ability of Louisiana residents to receive and dispense information, but places a prior restraint upon the physician's right to speak and the rights of the patient to hear what he has to say. A statute authorizing previous restraint upon the exercise of a guaranteed freedom, and which sweeps within its broad scope, activities that are protected speech is unconstititonal.[17]

Plaintiff challenges the constitutionality of La. R.S. 40: 1299.33 (D), which requires that the "parents" of an unmarried minor give written consent prior to the performance of an abortion.

La. R.S. 40:1299.33(D) reads as follows:

> No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required

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17. Griswold v. Conn.,,*supra;* Bigelow v. Va., *supra;* Assoc. Student U. of Calif at Riverside v. Atty. Gen., 368 F.S. 11 (C.D. Cal. 1973); Leigh v. Olsen, 385 F.S. 255 (D. N.D. 1974); Mitchell Family Planning v. City of Royal Oak; 335 F.S. 738 (E.D. Mich. 1972); NAACP Alabama, 377 U.S. 288 at 307, 84 S.Ct. 1302 (1964); Erznoznik v. City of Jacksonville, U.S. , 95 S.Ct. 2268 (1975).

to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance of any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood.

The statute applies directly to a physician's activities by limiting the abortions he can legally perform and restricts his right to practice medicine, resulting in financial loss.

Thus, we find that Dr. Calvin Jackson as a licensed physician who daily performs abortions, has standing to challenge the constitutionality of this statute.[18]

The Fifth Circuit has foreclosed this subject by its recent decision in Poe v. Gerstein, 517 F.2d 787 (C.A. 5 1975), in which it held that the fundamental right to an abortion applies to minors as well as to adults and that both the parental

18. Poe v. Gerstein, 376 F.S. 695 (S.D. Fla. 1973), app. dis. and cert. den. 417 U.S. 279, 94 S.Ct. 2246 (1974); Wolfe v. Schoering, 388 F.S. 631 (W.D. Ky. 1974).

and spousal consent requirements of a Florida statute, similar to the Louisiana statute involved here, were unconstitutional.

We are bound by that decision as controlling precedent and for the reasons expressed by the Fifth Circuit in that case. Thus, we hold La. R.S. 40:1299.33(D) unconstitutional.

Also, challenged is the constitutionality of Louisiana's Medicaid policy for the payment of abortions. Since a significant number of Dr. Jackson's patients who seek abortions are Medicaid eligible,we find that he has standing to institute this action. However, this issue will be disposed of in the opinion to follow.

MOTHER DOE ET. AL. V. STEWART, ET. AL. - No. 74-3197

Plaintiff, Jane Doe is an unmarried, pregnant, dependent minor, living with her natural mother, plaintiff Mother Doe. They are indigent recipients of Aid to Dependent children and enrollees in the joint Federal-State Medicaid Program. When plaintiffs were denied funds to procure an abortion, they instituted this class action seeking injunctive and declaratory relief, challenging Louisiana's interpretation of Title XIX of the Social Security Act and the constitutionality of Louisiana's Medicaid policy under the Ninth and Fourteenth Amendments to the United States Constitution.

We took under consideration, plaintiffs' motion to substitute Roy E. Westerfield for defendant Garland L. Bonin, a public official who was sued in his official capacity as Director of the Division of Family Services of Health and Human Resources. Since Mr. Bonin was succeeded by Mr. Westerfield effective April 7, 1975, plaintiffs' motion is granted.[19]

19. Rule 25(d) Federal Rules of Civil Procedure.

Also pending decision is defendants' motion to dismiss plaintiffs' complaint.

Plaintiffs' counsel are NOLAC[20] attorneys who have instituted this action to procure Medicaid payments for non-therapeutic abortions.

Defendants moved to dismiss this suit on grounds that the new Legal Assistance Act prohibits such suits by federally funded corporations.

On July 25, 1974, the Legal Services Corporation was established by the Legal Services Corporation Act of 1974[21] which was specifically designed to transfer the legal services program to it from the Office of Economic Opportunity (EOC). Under the Act no funds of the corporation may be used to provide legal assistance for any proceeding to procure a non-therapeutic abortion.[22]

Appropriations under the Legal Services Corporation Act are not available until six or more members of the Corporation's Board have been appointed by the President and confirmed by the Senate. As of May 27, 1975, the Corporation's Board had not taken such action. Furthermore, transfer of the legal services program from the Office of EOC is not complete until ninety days after the first meeting of the Board.

In view of the fact that NOLAC is not currently being financed by Legal Services Corporation but is still operating pursuant to the Economic Opportunity Act of 1964,[23] defendants' motion to dismiss is denied.

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20. New Orleans Legal Assistance Corporation, a federally funded agency.

21. 42 U.S.C. 2996 *et seq.*

22. 42 U.S.C. 2996f(b) (8).

23. 42 U.S.C. 2809(a) (3).

Additionally, we hold that plaintiffs' motion to certify their action as a class action is granted.

We find that the class in this case is composed of all pregnant women residing in the State of Louisiana who are indigent recipients of Aid to Dependent Children and are enrollees in the joint Federal-State Medicaid Program, and who desire or will desire abortions within the first trimester of pregnancy.

The requirements of Rule 23 are met here since the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate, declaratory relief to the class as a whole.[24]

Plaintiffs contend that Louisiana's informal policy of limiting payment for abortions under Medicaid to only those instances where abortions are necessary to save the life of the mother violate the medical assistance program of the Social Security Act and deny them equal protection under the 14th Amendment to the U.S. Constitution.

Plaintiffs attack the State's policy on both statutory and constitutional grounds, but since a three-judge court has been convened, to defer the determination of the statutory attack to a single judge would be time consuming, therefore the three-judge panel will decide the statutory claims presented.[25]

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24. Rule 23(b)(2) F.R.C.P.

25. Hagans v. Levine, 415 U.S. 528, 94 S.Ct. 1372 (1974); Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, (1970); Doe v. Westby, 383 F.S. 1143 (D.S.D. 1974) vac. & rem., U.S. , 95 S.Ct. 1385 (1974).

We find that plaintiffs, consisting of an unmarried pregnant dependent minor and her mother, who are indigent recipients of Aid to Dependent Children and enrollees in the joint Federal-State Medicaid Program, have standing to challenge state-wide regulations prohibiting the payment of funds for abortions other than to save the life of the mother.[26]

The Medical Assistance Program of the Social Security Act (Medicaid)[27] is a federal grant-in-aid project which establishes a comprehensive scheme of medical care for the needy to be administered by the states and jointly funded by the federal and state governments. Louisiana is a voluntary participant in the plan. It extends medical assistance to all recipients of Aid to Families with Dependent Children (AFDC)[28] and other needy persons.[29]

For a state to receive federal monies, its program must meet federal requirements and is obligated to provide certain minimal services, among which are in-patient and out-patient hospital services, family planning services, and physicians' services.[30]

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26. Doe v. Bolton, *supra*; Roe v. Wade, *supra;* Doe v. Wohlgemuth, 376 F.S. 173 (W.D. Pa. 1974), vac. & rem. on other grounds, 505 505 F.2d 186 (C.A. 3-1975).

27. 42 U.S.C. 1396 *et seq.*

28. 42 U.S.C. 601 *et seq.*

29. La. R.S. 46:153A reads;
"Medical assistance in the form of payment for medical care... may be provided under rules and regulations of the State Board of Public Welfare to any person who;
(1) meets the requirement for public assistance; or
(2) does not meet the requirements for public assistance, but whose income and resources are not sufficient to meet his medical needs.

30. 42 U.S.C. 1396a(a)(13) (B); 1396d(a).

Louisiana's Medicaid Policy Statement entitled "Limitation on Payment for Abortions Under Title XIV," Memorandum No. 74-84, dated June 17, 1974, issued by Garland L. Bonin to State and Parish Staffs reads as follows:

> In the State of Louisiana only therapeutic abortions are recognized as legal. The law specifically defines therapeutic as a medical condition or conditions which is "life threatening" to the pregnant woman. The diagnosis of pregnancy only is not within the framework of this definition. The law also prescribes the action and documentation necessary to the performance of an abortion. We can make payment through our medical assistance program only for an abortion done in accordance with the existing Louisiana abortion law.
>
> We have secured an opinion from the Attorney General's office that payment for elective abortions in a state where such abortions are legal is also prohibited. This means that we cannot make payment in or out of the state for an abortion except that done in accordance with existing Louisiana abortion law.

Although under Memorandum No. 74-84, Louisiana allowed reimbursement under Medicaid for only those abortions necessary to save the life of the mother, obviously since the Rosen decision,[31] Louisiana has expanded its definition of "therapeutic," to include those abortions necessary to prevent serious and permanent impairment to the physical health of the mother.[32] Additionally, Louisiana's written

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31. Rosen v. La. State Bd. of Medical Examiners, 318 F.S. 1217 (E. D. La. 1970) vac. & rem. 12 U.S. 902, 93 S.Ct. 2285, on rem. 380 F.S. 875 (1975) aff'd. U.S. , 95 S.Ct. 767.

32. See Memoranda of Authorities dated May 27, 1975, wherein Mr. Louis M. Jones, Assistant Attorney General for the State of Louisiana stated at p. 1:

(Footnote 32 continued on next page.)

policy provided payment for only those abortions done in accordance with existing Louisiana abortion law. Since we have this date declared some of those laws unconstitutional, we assume Louisiana will continue to provide payment for those abortions done in accordance with existing Louisiana abortion laws.

When Congress enacted the provisions of the Social Security Act, it was cognizant of the limitations on state resources,[33] giving the states great latitude in establishing standards for the administration of various plans under the doctrine of a "scheme of cooperative federalism."[34]

42 USC 1396 provides that the Act is:

> For the purpose of enabling each State, *as far as practicable under the conditions in each State,* to furnish (1) medical assistance on behalf of families with dependent children. . .(Emphasis supplied).

CFR 249.10(a) (5) provides that although a participating state may not arbitrarily deny medical care to an eligible individual solely because of the diagnosis or type of illness, the

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(Footnote 32 - continued from previous page)

"It is the defendants' contention that the Constitution does not impose an affirmative burden on this State to pay for elective, medically nonessential abortions, when the policy of the Louisiana Health and Human Resources Administration is to provide payments for therapeutic, medically necessary abortions. A therapeutic abortion is defined in Doe v. Rose, 499 F.2d 1112 (10th Circuit, 1974) as 'one necessary to save the life of the expectant mother or to prevent serious and permanent impairment to her physical health.' "

33. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 at p. 1158 (1970).

34. King v. Smith, 392 U.S. 309, 88 S.Ct. 2128 (1968); Doe v. Wohlgemuth, *supra* at 184.

State may place appropriate limits on services based on such criteria as "medical necessity."

When Congress enacted the Medicaid statute, non-therapeutic abortions were prohibited in all fifty states. Congressional intent to include coverage was necessarily lacking. When Congress passed the Family Planning Services and Research Act of 1970, abortion was specifically excluded as a means of family planning to be recognized under the Act.[35] In establishing the Legal Services Corporation System, Congress again provided that no funds of the corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion.[36]

Thus, in view of Congress' recognition of a State's limited resources, its attitude toward abortions and its silence on the subject, we believe that Congress did not intend that States should pay for non-medically necessary abortions as necessary medical expenses when States are not required to fund other medically non-necessary services such as elective cosmetic surgery.

Additionally, as part of a proposed rule which would increase federal participation to 90% in the area of family planning, the Department of Health, Education & Welfare, which is charged with the administration of the Social Security Act, on December 9, 1974, stated that federal matching funds would be "available for abortions when provided under the State's plan as a physician's service or otherwise."[37]

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35. 42 U.S.C. 300-a-6.

36. 42 U.S.C. 2996f(b) (8).

37. See Federal Register, December 9, 1974.

Although HEW's statement indicates that non-therapeutic abortion coverage is not prohibited by 45 USC 1396(a),it supports the argument that whether or not such abortions are covered is up to the States. See Burns v. Alcala, 420 U.S. 575, 95 S.Ct. 1180 at p. 1184, n. 5 (1975). Thus, we find Louisiana's current policy consistent with the Social Security Act.[38]

LADY JANE, ET. AL. VS. CONNICK, ET. AL. - No. 75-474

At the time suit was instituted, Mary Jane was a 15 -year old unmarried, 8 week pregnant indigent minor living with her mother. After consulting with her physician, Mary Jane requested Charity Hospital to perform an elective abortion. Upon their refusal, Mary Jane and her mother instituted a class action for damages as well as declaratory and injunctive relief attacking the constitutionality of La. R.S. 14:88

38. Roe v. Ferguson, 515 F.2d 279 (CA6-1975); Doe v. Wohlgemuth, *supra.*

In our view, the constitutional attack would also fail for the following reasons:

In view of the fact that we are dealing here with low income status and not with a suspect classification (San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1973, and Citizens Comm. for Faraday Woods v. Lindsay, 507 F.2d 1065, C.A. 2-1974, cert. den., U.S. , 95 S.Ct. 1679, 1975), or a basic necessity of life (Mem. Hosp. v. Maricopa Hosp., 415 U.S. 250, 94 S.Ct. 1076, 1974) and since there is no constitutional right to receive public welfare (Smith v. Reynolds, 277 F.S. 65, E.D. La. 1967, aff. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 1969) we find Louisiana's current medicaid policy of providing funds for abortions necessary to preserve the life or health of the mother rationally related to a legitimate governmental interest. (Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 1972; Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 at p. 1158, 1970; Burr v. Smith, 322 F.S. 980 D.C. Wash. 1971, aff. 404 U.S. 1027, 92 S.Ct. 717, 1971; Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 1971; United Low Income, Inc. v. Fisher, 470 F.2d 1074, C.A. 1-1972; Henry v. Betit, 323 F.S. 418, D.C. Alaska 1971; Carroll v. Finch, 326 F.S 891, D.C. Alaska; Youakim v. Miller, 374 F.S. 1204, N.D. Ill, 1974, app. pend. U.S. , 95 S.Ct. 1389, 1975).

(pertaining to the distribution of abortifacients) and the abortion policy of Charity Hospital of Louisiana in New Orleans, heretofore disposed of in Raimer vs. Connick; La. R.S. 40:1299.33(D), (the parental consent statute) and La. R.S. 40:1299.34 (the anti-abortion counseling statute) heretofore disposed of in Jackson v. Guste.

We find that plaintiffs, an unmarried pregnant minor seeking a first trimester abortion and her mother have standing to challenge these statutes.

Additionally, plaintiffs' motion to certify this action as a class action is granted.

The class is composed of all unmarried pregnant minors residing throughout the State of Louisiana who desire or will desire abortions within the first trimester of pregnancy.

The requirements of Rule 23 are met here since the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate, declaratory relief to the class as a whole.[39]

ATTORNEYS' FEES

In view of the fact that there is no evidence that any defendant acted in bad faith, vexatiously, wantonly or for oppressive reasons, plaintiffs' requests for attorneys' fees are denied.[40]

39. Rule 23(b) (2) F.R.C.P.; Coe v. Gerstein, *supra;* Doe v. Mundy, 378 F.S. 731 (E.D. Wis. 1974) aff. 514 F.2d 1179 (C.A. 7-1975), Doe v. Turner, 361 F.S. 1288 (S.D. Iowa 1973), app. den. 488 F.2d 1134 (CA8-1973).

40. Alyeska Pipeline Service Co. v. Wilderness Society, 495 F.2d 1026 (App. D.C. 1974, rvs. 411 U.S. 240, 95 S.Ct. 1612 (1975); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974).

RELIEF

An appropriate judgment enjoining defendants and/or their agents and/or their representatives from enforcing the provisions La. R.S. 14:87 (pertaining to the crime of abortion), La. R.S. 14:87 (the anti-abortion advertising statute), La. R.S. 14:88 (the anti-distribution of abortifacients statute), La. R.S. 40:1299.33(D) (the parental or spousal consent statute) and La. R.S. 40:1299.34 (the anti-abortion counseling statute) shall be entered in accordance with the views expressed in this opinion. All other relief sought by plaintiffs is denied.

New Orleans, Louisiana, this 26 day of January, 1976.

s/ Robert A. Ainsworth, Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United States District Judge
Concurring in part and dissenting in part. Dissenting opinion attached hereto.

CASSIBRY, J., concurring in part and dissenting in part.

I concur in all the Court's opinion in No. 73-469 except as follows:

The only reasonable inference to be drawn from the clear evidence in this case, in my opinion, is that there is a silent policy among those in authority at Charity Hospital of New Orleans which effectively bars elective abortions. Hospital statements of Admission Policy were not disseminated to the hospital staff. Dr. Charles Mary's statement denouncing the *Roe* and *Doe* decisions of the Supreme Court and declaring that no actions would be taken in Louisiana hospitals that destroyed human life was widely disseminated and was obviously still accepted as the policy of the public hospitals of Louisiana.

I would order the hospital state affirmatively that its staff was prepared to effectuate the mandate of the Supreme Court that elective abortions would be available at Charity Hospital to indigent or otherwise eligible women in the first trimester of pregnancy. More specifically, I believe that the written policy of Charity Hospital as applied by those in charge of its OB-GYN clinic is an unconstitutional infringement upon the fundamental right of privacy as set out in *Roe* and *Doe* and of the equal protection clause of the Fourteenth Amendment.

I would agree, however, that those doctors who have moral and religious convictions against abortions would not be required to participate in these procedures.

As to No. 74-3197, I would hold that Louisiana's informal policy of limiting payment for abortions under Medicaid to only those instances where abortions are necessary to save the life of the Mother are violative of the Medical Assistance

Program of the Social Security Act. *Doe, et al v. Beal, et al,* 523 F.2d 611 (3d Cir., July 21, 1975). I find the majority opinion in the *Doe v. Beal* case persuasive.

s/ Fred J. Cassibry
UNITED STATES DISTRICT JUDGE

APPENDIX II

JUDGMENT OF DISTRICT COURT

FILED: Feb 20, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LINDA FAY WEEKS, Wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated	CIVIL ACTION NO. 73-469

VERSUS

HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration	SECTION "F"

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC.	CIVIL ACTION

VERSUS

WILLIAM J. GUSTE, JR., Attorney General of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, individually and in their official capacities	NO 74-2425 SECTION "F"

MOTHER DOE, Individually and on behalf of her minor daughter, JANE DOE and on behalf of all others similarly situated — CIVIL ACTION

VERSUS

WILLIAM H. STEWART, M.D., individually and in his official capacity as Commissioner of the State of Louisiana HEALTH AND HUMAN RESOURCES ADMINISTRATION; and GARLAND L. BONIN, individually and in his official capacity as Director of FAMILY SERVICES OF THE STATE OF LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION — NO 74-3197 — SECTION "F"

LADY JANE, on behalf of MARY JANE, on behalf of themselves and all others similarly situated — CIVIL ACTION

VERSUS

HON. HARRY CONNICK, DISTRICT ATTORNEY of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana; WILLIAM H. STEWART, M.D., Commissioner of the LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION; and LEE FRAZIER, Administrator, Charity Hospital of Louisiana — NO. 75-474 — SECTION "F"

CONSOLIDATED

JUDGMENT

These actions brought under 42 U.S.C. 1983 came before a three judge court for hearing on the merits challenging the constitutionality of certain Louisiana statutes, regulations and policies pertaining to abortions.

For the reasons set forth in the Court's opinion:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. *RAIMER, et al vs. CONNICK, et al - No. 73-469*

1. that Motion of Defendants to dismiss plaintiffs' complaint for lack of standing to sue is denied.

2. that L.R.S. 14:87, a criminal statute prohibiting the performance of all abortions is declared unconstitutional.

3. that L.R.S. 14:88, a criminal statute prohibiting the distribution or advertisement of abortificients is declared unconstitutional.

4. that the written policy of Charity Hospital of Louisiana in New Orleans of July 14, 1974, is constitutional, therefore plaintiffs' motion for declaratory relief is denied.

It is further Ordered, Adjudged and Decreed that plaintiffs request for injunctive relief is denied, however, defendants are to take immediate positive steps to disseminate the written policy of July 14, 1974 to all physicians, house officers and other personnel employed at said hospital, but in no event are those doctors, nurses and other personnel who work at said hospital and who have moral and/or religious convictions against the performance of abortions required to participate in their performance.

II. *JACKSON, et al vs. GUSTE, et al - No. 74-2425*

1. that motion of defendants to dismiss this action based upon the doctrine of abstention and comity is denied.

2. that motion of defendants to dismiss this action for lack of federal jurisdiction under Article III of the U.S. Constitution is denied.

3. that Motion of defendants to dismiss Delta Women's Clinic, Inc. on the grounds of a lack of a "case or controversy" under Article III, Section 2 of the U.S. Constitution is granted.

4. that Motion of defendants to dismiss Dr. Calvin Jackson's suit for lack of standing is denied.

5. that L.R.S. 14:87, a criminal statute prohibiting the performance of all abortions is declared unconstitutional.

6. that L.R.S. 14:87.4 pertaining to the crime of abortion advertising is declared unconstitutional.

7. that L.R.S. 40:1299.33(D), the parental or spousal consent requirement statute, is declared unconstitutional.

8. that L.R.S. 40:1299.34, the anti-abortion counseling statute is declared unconstitutional.

9. that the Medicaid policy of the State of Louisiana, providing payments for therapeutic abortions only is consistent with the Social Security Act of 1935, as amended and is declared constitutional. It is further ordered, adjudged and decreed that plaintiff's request for declaratory and injunctive relief is denied.

III. *DOE, et al vs. STEWART, et al - No. 74-3197*

1. that Motion of plaintiffs to substitute Roy E. Wester-

field for Garland L. Bonin as the Director of the Division of Family Services of the Louisiana Health and Human Resources Administration is granted.

2. that Motion of plaintiffs to certify this suit as a class action is granted. It is further ordered that the class is composed of all pregnant women residing in the State of Louisiana who are indigent recipients of Aid to Dependent Children, are enrollees in the joint Federal-State Medicaid Program, and who desire or will desire abortions within the first trimester of pregnancy.

3. that Motion of defendants to dismiss this action on the grounds that the new Legal Assistance Act prohibits this suit by NOLAC, a federally-funded corporation, is denied.

4. that the Medicaid policy of the State of Louisiana providing payments for therapeutic abortions only, is consistent with the provisions of the Social Security Act of 1935, as amended, and is declared constitutional. It is further ordered, adjudged and decreed that plaintiff's request for declaratory and injunctive relief as requested is denied.

IV. *LADY JANE, et al vs. CONNICK, et al - No. 75-474*

1. that Motion of Defendants to dismiss plaintiffs' complaint for lack of standing to sue is denied.

2. that Motion of Plaintiffs' to certify this suit as a class action is granted. It is further ordered that the class is composed of all unmarried pregnant minors residing throughout the State of Louisiana who desire or will desire abortions within the first trimester of pregnancy.

3. that L.R.S. 14:88, a criminal statute prohibiting the distribution or advertisement of abortificients is declared unconstitutional.

4. that L.R.S. 40:1299.33(D), the parental or spousal requirement statute, is declared unconstitutional.

5. that L.R.S. 40:1299.34, that anti-abortion counseling statute is declared unconstitutional.

6. that the written policy of Charity Hospital of Louisiana in New Orleans of July 14, 1974, is constitutional, therefore plaintiffs' motion for declaratory relief is denied.

It is further Ordered, Adjudged and Decreed that plaintiffs request for injunctive relief is denied, however, defendants are to take immediate positive steps to disseminate the written policy of July 14, 1974, to all physicians, house officers and other personnel employed at said hospital, but in no event are those doctors, nurses and other personnel who work at said hospital and who have moral and/or religious convictions against the performance of abortions required to participate in their performance.

V. That in each of the above consolidated cases defendants and/or their agents and/or their representatives are enjoined from enforcing the provisions of each of the Louisiana statutes hereinabove declared unconstitutional.

VI. That request of plaintiffs in each of the above consolidated cases for attorneys' fees and all other relief sought and herein not specifically granted is denied.

New Orleans, Louisiana, this 20th day of February, 1976.

s/ Robert A. Ainsworth, Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United Staes District Judge (Concurring in part in the above judgment as stated in my dissenting opinion)

APPENDIX III

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED: March 8, 1976

LINDA FAY WEEKS, wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated — CIVIL ACTION

VERSUS

HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration — NO. 73-469 Section "F"

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC. — CIVIL ACTION

VERSUS

WILLIAM J. GUSTE, JR., Attorney General of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., Health and Human Resources Administration, individually and in their official capacities — NO. 74-2425 SECTION "F"

MOTHER DOE, individually and on behalf of her minor daughter, JANE DOE, and on behalf of all others similarly situated — CIVIL ACTION NO. 74-3197

VERSUS

WILLIAM H. STEWART, M.D., individually and in his official capacity as Commissioner of the State of Louisiana Health and Human Resources Administration; and GARLAND L. BONIN, individually and in his official capacity as Director of Family Services of the State of Louisiana Health and Human Resources Administration — Section "F"

LADY JANE, on behalf of Mary Jane, on behalf of themselves and all others similarly situated — CIVIL ACTION NO. 75-474

VERSUS

HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, Attorney General of the State of Louisiana; WILLIAM H. STEWART, M.D., COMMISSIONER of the Louisiana Health and Human Resources Administration; and LEE FRAZIER, Administrator, Charity Hospital of Louisiana — Section "F" (Consolidated Cases)

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Defendants, through the Honorable William J. Guste, Jr. move this Court pursuant to Rule 62(C) of the Federal

Rules of Civil Procedure to order a stay of the execution of the consolidated judgments rendered in this action on February 24, 1976, pending said defendants' appeal from said consolidated judgements to the Supreme Court of the United States; and, as grounds for said motion, the defendants say:

1. That the defendants will suffer irresparable injury in the loss of time of its officers, agents, and employees and expenses to be incurred by the defendants in the event that said judgments are reversed upon the defendants' said appeal therefrom;

2. That the defendants will suffer irreparable injuries in complying with the injunction decreed by the Court's final consolidated judgments, in the event said judgments are reversed on the defendants' said appeal therefrom.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

WARREN E. MOULEDOUX
First Assistant Attorney General

JAMES P. SCREEN
Attorney for Louisiana Health & Human Resources Administration

s/ BY: Louis M. Jones
LOUIS M. JONES
Assistant Attorney General
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234 Loyola Avenue
New Orleans, Louisiana 70112
Phone: (504) 527-8371

ORDER

The defendants having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the above-entitled causes pending the defendants' appeal to the Supreme Court of the United States.

IT IS ORDERED that execution of, or any proceedings to enforce, said judgments be and the same is hereby stayed until the defendants' appeal to the Supreme Court is disposed of.

New Orleans, Louisiana, March 4, 1976.

s/ Robert A. Ainsworth, Jr.
UNITED STATES CIRCUIT
JUDGE

s/ Lansing L. Mitchell
UNITED STATES DISTRICT
JUDGE

I WOULD DENY THE STAY
ORDER

s/ Fred J. Cassibry
JUDGE

APPENDIX IV

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

FILED: March 19, 1976

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC. (Plaintiffs)	CIVIL ACTION
versus	
WILLIAM J. GUSTE, JR., Attorney General of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney, WILLIAM H. STEWART, M.D., HEALTH & HUMAN RESOURCES ADMINISTRATION, individually and in their official capacities (Defendants)	NO. 74-2425 SECTION "F"

NOTICE OF APPEAL

Notice is hereby given that defendants, William J. Guste, Jr ., Attorney General of Louisiana; Charles B. Odom, M.D., Louisiana State Board of Medical Examiners, Harry Connick, District Attorney, William H. Stewart, M.D., Health & Human Resources Administration, individually and in their official capacities, hereby appeal to the Supreme Court of the United States from the final judgment of a three-judge District Court entered on February 24, 1976. That said judgment, among other things, held the following:

1. That Louisiana Revised Statute 14:87, a criminal statute prohibiting the performance of all abortions is unconstitutional.

2. That Louisiana Revised Statute 14:87.4 pertaining to the crime of abortion advertising is unconstitutional.

3. That Louisiana Revised Statute 40:1299.33(D), the parental or spousal consent requirement statute is unconstitutional.

4. That Louisiana Revised Statute 40:1299.34, the anti-abortion counselling statute is unconstitutional.

5. That defendants and/or their agents, and/or their representatives are enjoined from enforcing the provisions of said statutes.

This appeal is taken pursuant to 28 U.S.C. #1253.

This 19th day of March,1976.

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

WARREN E. MOULEDOUX
First Assistant Attorney General

LOUIS M. JONES
Assistant Attorney General

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APPENDIX V

ORDER EXTENDING TIME FOR DOCKETING APPEAL

SUPREME COURT OF THE UNITED STATES

NO. A-965

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL
OF LOUISIANA, ET AL.,
Appellants

V.

LINDA FAY WEEKS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1976.

s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of
May, 1976

APPENDIX VI

JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FILED: June 15, 1976

LINDA FAY WEEKS, Wife of Gary Albert RAIMER and GARY ALBERT RAIMER, on behalf of themselves and all others similarly situated — CIVIL ACTION

VERSUS — NO. 73-469

HON. HARRY CONNICK, District Attorney of the Parish of Orleans, HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration — SECTION "F"

CALVIN JACKSON, M.D. and DELTA WOMEN'S CLINIC, INC. — CIVIL ACTION

VERSUS — NO. 74-2425

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL of Louisiana; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTRATION, individually and in their official capacities — SECTION "F"

JUDGMENT

This action came on a motion to correct the judgment under Federal Civil Procedure Rule 60(b).

IT IS ORDERED, ADJUDGED AND DECREED:

THAT the reasons for judgment dated January 26, 1976 are hereby clarified and the judgment entered February 24, 1976 is amended as follows:

THAT in accordance with *Connecticut v. Menillo*, U.S. , 96 S. Ct. 170 (1975) Louisiana's criminal abortion statute is unconstitutional only when applicable to prosecution for abortions performed by licensed physicians and their supportive personnel. Said statute is not unconstitutional when applied in the prosecution of abortions performed by unqualified personnel.

THAT the Attorney General of Louisiana and/or his agents and/or his representatives are only enjoined from prosecuting licensed physicians and their supportive personnel for the abortion procedure performed in violation of the Louisiana criminal statute L.R.S. 14:87.

New Orleans, Louisiana, June 12, 1976.

s/ Robert A. Ainsworth, Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/ Lansing L. Mitchell
LANSING L. MITCHELL
United States District Judge

s/ Fred J. Cassibry
FRED J. CASSIBRY
United States District Judge

APPENDIX VII

AN ACT

To amend Chapter 5 of Title 40 of the Louisiana Revised Statutes of 1950 by adding thereto a new part to be designated as Part XVIII thereof, to be comprised of R.S. 40:2399.31 through R.S. 40:1299.34, to provide for the requirement of consent to and the right to refuse to participate in abortions, including refusal to consent to abortion, refusal to submit to abortion, and refusal to permit the use of facilities for the performance of abortion and also to provide for the right to refuse to counsel an abortion, and in connection therewith to prohibit discrimination or pressure for any such refusal and to provide that certain persons, entities and facilities shall not be held liable for such refusal, and to further implement such rights by providing for explanations in connection with consent and for the evidence of consent; to prohibit denial of governmental assistance for such refusal and to prohibit the requiring or recommending of an abortion by any public employee or employee of a social service agency which receives governmental assistance and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Part XVIII of Chapter 5 of Title 40 of the Louisiana Revised Statutes of 1950, comprised of R.S. 40:1299.31 through R.S. 40:1299.34, is hereby enacted to read as follows:

PART XVIII. ABORTION

§ 1299.31. Discrimination against certain persons; pro-

hibition

A. No physician, nurse, student or other person or corporation shall be held civilly or criminally liable, discriminated against, dismissed, demoted, or in any way prejudiced or damaged because of his refusal for any reason to recommend, counsel, perform, assist with or accommodate an abortion.

B. No worker or employee in any social service agency, whether public or private, shall be held civilly or criminally liable, discriminated against, dismissed, demoted, in any way prejudiced or damaged, or pressured in any way for refusal to take part in, recommend or counsel an abortion for any woman.

§ 2399.32. Discrimination against hospitals, clinics and the like; prohibition

No hospital, clinic or other facility or institution of any kind shall be held civilly or criminally liable, discriminated against, or in any way prejudiced or damaged because of any refusal to permit or accommodate the performance of any abortion in said facility or under its auspices.

§ 239933. Governmental assistance; discrimination for refusal to participate in an abortion; prohibition

A. The term governmental assistance as used in this section shall include federal, state and local grants, loans and all other forms of financial and other aid from any level of government or from any governmental agency.

B. No woman shall be denied governmental assistance or be otherwise discriminated against or pressured in any way

for refusing to accept or submit to an abortion, which she may do for any reason and without explanation.

C. No hospital, clinic, or other medical or health facility, whether public or private, shall ever be denied governmental assistance or be otherwise discriminated against or otherwise be pressured in any way for refusing to permit its facilities, staff or employees to be used in any way for the purpose of performing any abortion.

D. No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance or any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents, or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood.

2399.34. Employees of state and political subdivisions; counseling abortion prohibited.

No person employed by the state of Louisiana, by contract or otherwise, or of any subdivision or agency thereof, and no person employed in any public or private social service agency, by contract or otherwise, including workers therein, which is a recipient of any form of governmental assistance, shall require or recommend that any woman have an abortion. Notwithstanding anything contained herein to the contrary, this section shall not apply to a doctor of medicine, currently licensed under the provisions of the Louisiana Medical Practices Act (R.S. 37:1261, et seq.) who is acting to save or preserve the life of a pregnant woman.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved by the Governor: June 18, 1973.

A true copy:

WADE O. MARTIN, JR.
Secretary of State

In The

Supreme Court of the United States

October Term, 1976

No. 76-61

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS [LBME]; HARRY CONNICK, DISTRICT ATTORNEY ORLEANS PARISH; WILLIAM H. STEWART, M.D.; HEALTH AND HUMAN RESOURCES ADMINISTRATION; individually in their official capacities, their agents, assigns, successors, those acting in concert with them, and all others similarly situated,

Appellants

versus

CALVIN JACKSON, M.D., and DELTA WOMEN'S CLINIC, INC.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT THEREOF

ROBERT PATRICK VANCE
HARRY S. HARDIN, III
Jones, Walker, Waechter,
Poitevent, Carrere and Denegre
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New Orleans, Louisiana 70112
Counsel for Delta Women's
Clinic, Inc.

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In The

Supreme Court of the United States

October Term, 1976

No. 76-61

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS [LBME]; HARRY CONNICK, DISTRICT ATTORNEY ORLEANS PARISH; WILLIAM H. STEWART, M.D.; HEALTH AND HUMAN RESOURCES ADMINISTRATION; individually in their official capacities, their agents, assigns, successors, those acting in concert with them, and all others similarly situated,

Appellants

versus

CALVIN JACKSON, M.D., and DELTA WOMEN'S CLINIC, INC.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT THEREOF

Motion to Affirm or Dismiss

Appellee, Delta Women's Clinic, Inc., pursuant to Rule 16 of the Rules of The Supreme Court of the United States, moves to affirm that portion of the final judgment of the three-judge District Court from which defendants appeal on the grounds that the question presented warrants no further argument and is so unsubstantial as not to warrant further review and to dismiss defendants' appeal for the reasons set forth in the following supporting brief.

BRIEF IN SUPPORT OF MOTION TO AFFIRM OR DISMISS

Statute Involved .

La. R.S. 40:1299.33(D), West's LSA Revised Statutes, vol. 23 (1976) Pocket Part at page 149, reads as follows:

No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance or any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents, or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood.

Question Presented

Is La. R.S. 40:1299.33(D) Constitutional?

ARGUMENT

In *Jackson, et al. vs. Guste, et al.*, U.S.D.C. for the Eastern District of Louisiana, No. 74-2425, below, the three-judge District Court held, among other things (See *Appellants Jurisdictional Statement*, Appendix I, p. 34a), that each of the following statutes were

unconstitutional: La. R.S. 14:87, a criminal statute prohibiting the performance of all abortions; La. R.S. 14:87.4, pertaining to the crime of abortion advertising; La. R.S. 40:1299.33(D) the parental or spousal abortion consent statute; and La. R.S. 40:1299.34 the anti-abortion counseling statute. La. R.S. 14:87 was held not unconstitutional when applied in the prosecution of abortions performed by unqualified personnel (See, *Appellants Jurisdictional Statement*, Appendix III, p. 38a).

In this appeal, appellants have chosen only to question the lower court's ruling with respect to La. R.S. 40:1299.33(D), therefore the lower court's holdings with respect to the other statutes are apparently final insofar as this case is concerned.

THE NARROW HOLDING OF THE THREE-JUDGE DISTRICT COURT'S DECISION WHICH IS THE SUBJECT OF THIS APPEAL IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

With respect to La. R.S. 40:1299.33(D), appellants have misstated the question in this case. It is not "Is A Statute Requiring A Woman's Informed Consent To An Abortion Constitutional?" but whether La. R.S. 40:1299.33(D), either in toto or in part, is constitutional. A concomitant issue is whether La. R.S. 40:1299.33(D) is severable so that portions of the statute may be construed as constitutional in accordance with *Planned Parenthood of Central Missouri, et al., v. Danforth et al.*, 96 S. Ct. 2831 (1976). La. R.S. 40:1299.33(D) is not severable because of poor draftsmenship and because, after deleting the unconstitutional portions, the legislative intent is untenably vague and ambiguous.

A.
LA. R.S. 40:1299.33(D) IS UNCONSTITUTIONALLY OVERBOARD.

Although the decision of *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, 96 S. Ct. 2831 (1976) held that it is not unconstitutional for a state to require written informed consent of a woman prior to submitting to an abortion, it is nevertheless settled that

a state may not protect its interests by means that stifle fundamental liberties when the end sought can be more narrowly achieved. *N.A.A.C.P. v. Alabama,* 377 U.S. 288 (1964); *Shelton v. Tucker,* 364 U.S. 479 (1960). The posture of the State of Louisiana since *Roe v. Wade,* 410 U.S. 113 (1973) and *Doe v. Bolton,* 410 U.S. 179 (1973) has been one of recalcitrant and premeditated resistance to lawful abortion on every front. *See* Note, *Abortion Regulation: Louisiana's Abortive Attempt,* 34 *La. L. Rev.* 676, 685 (1974). The implicit purpose of La. R.S. 40:1299.33(D) is to impose an extra layer of unconstitutionally burdensome regulation on the abortion decision.

Appellants rely on *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.* to maintain the constitutionally of La. R.S. 40:1299.33(D). The statute in that case and the statement of this Court permitting a state to require prior written consent to an abortion are far more narrow than Louisiana's statute even after the unconstitutional language is deleted. (See *Appellants Jurisdictional Statement* p. 5.) *Danforth* held it is not an infringement on a woman's right to abort if she is required to give prior written consent. The Court indicated at 96 S. Ct. 2840 that it is desirable that the decision to abort "be made with full knowledge of its nature and consequences." The Court, in footnote 8 at 2840, gives further insight into the statutorily required "informed consent":

> The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who comprised the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, *the giving of information to the patient as to just what would be done and as to its consequences.* To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession. (Emphasis Added).

The lower court *Danforth* decision shows that the information that is statutorily required to be provided to a woman so that she may give or withhold her "informed consent" relates to the physical and psychological ramifications of choosing a particular course of action, that is, to abort or not. *See,* 392 *F. Supp.* 1362, 1368-69 (E.D. Mo. 1975).

In addition to informed consent, La. R.S. 40:1299.33(D) requires that:

> No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation *and that she shall not be deprived of any other kind of benefits for refusing to submit to an abortion.* [S]uch written consent to set forth the *written advice and the written consent* . . . . (Emphasis Added).

Bellotti v. Baird, 96 S. Ct. 2847, 2866 (1976) clearly held that the state's power to require informed consent is not unlimited:

> [W]e held that a requirement of written consent on the part of a pregnant adult is not unconstitutional *unless it unduly burdens the right to seek an abortion.* (Emphasis Added).

La. R.S. 40:1299.33(D) portends further interference with fundamental rights by expanding "informed consent" so that it unduly burdens the right to seek an abortion. A statute requiring interminable advice, warning and information in addition to informing the woman of the physical and psychological consequences of an abortion burdens the physician and ascribes more meaning to the concept of "informed consent" than appears intended by the *Danforth* case. Thus, the statute, ignoring for the present the severability question, goes too far and is unconstitutionally overbroad. La. R.S. 40:1299.33(D) can be more narrowly drawn so as to protect the state's interests.

B.
LA. R.S. 40:1299.33(D)
IS NOT SEVERABLE.

A concomitant question to be resolved is whether La. R.S. 40:1299.33(D) is so poorly drafted as to preclude severability. Appellants have correctly stated the statute severability test. (See *Appellants Jurisdictional Statement* p. 6.) However, appellants have assumed two things: (1) that the language of the statute which remains after the deletion of the admitted unconstitutional provisions is itself constitutional; (2) and, that the language which remains after the deletion of the admitted unconstitutional provisions is not so interrelated with the deletions that the intent of the legislature is still present. As to the first assumption, the argument of unconstitutional overbroadness has been stated in A above.

The assumption that the remaining language is severable from the clearly unconstitutional provisions is a bald, unsupported assertion. Appellants, as supporters of the legislation, have the burden of demonstrating the severability of the provisions involved.

La. R.S. 40:1299.33(D) falls as a whole because even after deletion of the admitted unconstitutional provisions, it is doubtful and uncertain whether enforcement of the remaining language would be in accordance with the intent of the legislature. Appellants in their *Jurisdictional Statement* at page 5 note that the section of a Missouri statute requiring informed consent was upheld in *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, even though the sections requiring parental and spousal consent were held unconstitutional because the Court relied on a severability clause similar to the one that was enacted with La. R.S. 40:1299.33(D). There was little question as to the legislative intent in that case since the Missouri legislature had clearly set out in separate subsections of the statute the circumstances and consent required for an adult woman, a married woman, and an unmarried minor woman. See *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, 392 F. Supp. 1362, 1365 (E.D. Mo. 1975). Legislative intent is unclear in La. R.S. 40:1299.33(D).

Even assuming that the language left after deletion of the unconstitutional provisions is constitutional, the intent of the legislature would still be, at best, ambiguous. It is not unreasonable to expect the legislature to require additional safeguards for a minor in addition to the requirement of parental and/or spousal consent to an abortion. Such precautions might explain why the state has required oral and written information to the effect that refusal of an abortion would not deprive the woman of any kind of benefit or governmental assistance. It is not clear that the legislature intended or thought that such paternal and benevolent advice was necessary for an adult woman who would be expected to be a more informed and mature person.

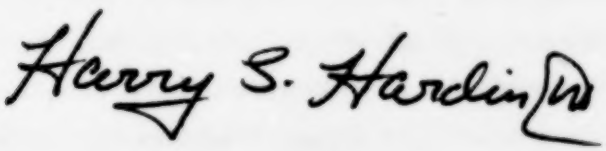
That which must be deleted as unconstitutional and that which would remain are so interrelated and connected that severability is precluded because legislative intent is no longer manifest. The admitted unconstitutional provisions are not simply additional types of informed consent. Deleting the unconstitutional provisions directly affects the operability of the law and destroys the overall intent of the legislature. These are not disjunctive and alternative legislative provisions, but rather conjunctive provisions, and as such cause the statute to fall as a whole.

As a practical matter, a finding that La. R.S. 40:1299.33(D) is unconstitutional does not create a void in the law. There are very few surgical procedures where Louisiana requires by statute a written informed consent. The State of Louisiana has resisted too long the mandates of *Roe v. Wade* and *Doe v. Bolton* and should be compelled to strictly redraw its law.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,



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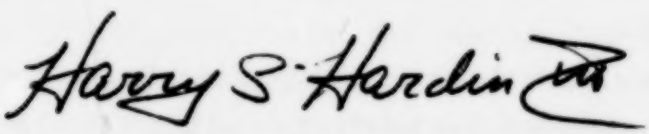
CERTIFICATE

I hereby certify that a copy of the foregoing Motion to Affirm or Dismiss has been sent by U.S. mail to opposing counsel properly addressed and postage prepaid on this 27th day of August, 1976.



Harry S. Hardin, III